

1 HONORABLE RICHARD A. JONES  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

11 DELANO MARCIEL THOMAS,

NO. 3:21-cv-05898-RAJ

12 Plaintiff,

ORDER

13 v.

14 PACIFIC COUNTY SHERIFF'S  
DEPARTMENT, et al.,

15 Defendants.  
16

17 This matter comes before the Court on Defendants' Pacific County Sheriff's  
18 Department, Sean Eastham, Johnathon Ashley, Nicholas Zimmerman, and Anthony  
19 Kimball's ("County Defendants" or "Defendants") motion seeking consideration of their  
20 previously filed motion for summary judgment, Dkt. # 33, and Plaintiff Delano Thomas's  
21 ("Plaintiff" or "Thomas") motion to set a scheduling conference, Dkt. # 47. For the  
22 reasons set forth below, the Court **GRANTS in part** Defendants' Motion for Summary  
23 Judgment, Dkt. # 33, and **DENIES as moot** Plaintiff's motion to set a scheduling  
24 conference. Dkt. # 47.

1           **I. FACTUAL AND PROCEDURAL BACKGROUND**

2           In November 2019, Plaintiff was arrested and charged with assault in the first  
3 degree pursuant to RCW 9A.36.11(1)(a) and unlawful possession of a firearm in the first  
4 degree pursuant to RCW 9.41.010, stemming from an incident that occurred in Pacific  
5 County on November 7, 2019. Dkt. # 1-2 (Complaint) ¶ 1.1; Dkt. # 6 (Answer of County  
6 Defendants), ¶ 1.1. On November 6, a fight occurred between Plaintiff's dog and a dog  
7 owned by a neighbor, Naomi Schuyler. Compl. ¶ 4.2. Plaintiff attempted to break up the  
8 fight, and in so doing, his right arm was injured. *Id.* The next day, Plaintiff called 911 to  
9 report that he had been threatened by a white male that Plaintiff identified as Jesse  
10 Westcott ("Westcott"). *Id.* ¶ 4.3. According to Plaintiff, Westcott was friends with  
11 Schuyler. *Id.* According to Plaintiff, Westcott threatened Plaintiff's life, saying that he was  
12 in a local fight club and Plaintiff "would be dead." *Id.* ¶ 4.4. After making the threat,  
13 Westcott drove away from Plaintiff's house in a white Chrysler vehicle. *Id.*

14           Defendant Nicholas Zimmerman, a Deputy with the Pacific County Sheriff's  
15 Department, responded to Plaintiff's call concerning the threat. Dkt. # 18 (Declaration of  
16 Nicholas Zimmerman) ¶ 2; Dkt. # 39 (Supplemental Thomas Declaration), Ex. F  
17 (November 7, 2019 Pacific County Sheriff Call Detail Report for "Threats"). Zimmerman  
18 created a Deputy Report dated November 19 memorializing his response to Plaintiff's  
19 call. Dkt. # 18, Ex. A. According to both Plaintiff and Zimmerman's Deputy Report,  
20 Plaintiff expressed fear that Westcott would return to his residence due to the prior night's  
21 dogfight. *Id.* Zimmerman told Plaintiff that if Westcott were to return, he could take  
22 "reasonable steps" to defend himself and his family if necessary. *Id.* Zimmerman also told  
23 Plaintiff that he could seek a court order prohibiting Westcott from contacting him. *Id.*  
24 Zimmerman indicated to Plaintiff that he would attempt to reach Westcott, but ultimately,  
25 he was unable to contact him before the end of his shift. *Id.* According to Zimmerman's  
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1 report, he later learned that Westcott and Plaintiff were involved in an altercation at  
 2 Plaintiff's home that same evening. *Id.* Zimmerman states that he did not respond to the  
 3 altercation at Plaintiff's home and took no part in Plaintiff's arrest or the collection of any  
 4 evidence related to the altercation. *Id.* ¶ 3.

5 After Zimmerman concluded his response to Plaintiff's 911 call, Westcott and  
 6 Genevieve May ("May") returned to Plaintiff's home in a white Chrysler. Compl. ¶¶ 4.6,  
 7 4.7. According to Plaintiff, Westcott was armed with a collapsible baton and May was  
 8 armed with a knife. *Id.* Plaintiff, who had armed himself with a handgun, states that  
 9 Westcott "confronted" him and charged at him. *Id.* ¶ 4.8. Plaintiff responded by saying,  
 10 "don't do this." *Id.* Plaintiff then shot Westcott in what he describes as an act of self-  
 11 defense. *Id.* Plaintiff called 911 to report the shooting and told the operator that he had  
 12 placed his handgun in the trunk of his vehicle. *Id.* ¶ 4.9; Dkt. # 15 (Declaration of Sean  
 13 Eastham), Ex. A (November 7, 2019 Pacific County Sheriff Call Detail Report for  
 14 "Weapon Offense").

15 Pacific County Sheriff's Deputy Sean Eastham responded to the call. Compl. ¶  
 16 4.10; Dkt. # 15 ¶ 3. According to Eastham's Deputy Incident Report, when he arrived at  
 17 the scene, he saw Westcott lying in the street in front of Plaintiff's home. Dkt. # 15, Ex. B.  
 18 May was applying pressure to a wound in Westcott's left groin area. *Id.* Westcott told  
 19 Eastham that Plaintiff shot him as Westcott stood in the street. *Id.* First responders soon  
 20 arrived to tend to Westcott. *Id.* Eastham then spoke to Plaintiff and obtained his  
 21 permission to open the truck of Plaintiff's vehicle. *Id.* There, Eastham found a .380  
 22 handgun, which Eastham took as evidence. *Id.*

23 Plaintiff explained to Eastham that Westcott threatened him earlier that day and  
 24 that Deputy Zimmerman responded to the incident. *Id.* At this point, Eastham returned to  
 25 Westcott, as first responders were now on the scene. *Id.* He saw a bullet hole in Westcott's  
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1 left groin area and saw a collapsible baton on the ground next to where Westcott had been.  
 2 *Id.* Eastham's report indicates that May told Eastham that Westcott had not removed the  
 3 baton from his waistband or made any threats towards Plaintiff. *Id.* May said that she and  
 4 Westcott drove to take care of a friend's dog nearby, and as they left the friend's home,  
 5 they stopped in front of Plaintiff's house. *Id.* Westcott got out of the car and began talking  
 6 with Plaintiff about the recent dog fight. *Id.* According to the story that May told Eastham,  
 7 Plaintiff approached Westcott and shot him. *Id.*

8 According to Eastham, Plaintiff said that Westcott entered Plaintiff's yard and was  
 9 about three feet past a wood post on the edge of Plaintiff's yard when Plaintiff shot  
 10 Westcott. Dkt. # 15, Ex. B. However, Eastham reported that he found the bullet casing on  
 11 the edge of the street outside of Plaintiff's yard, approximately thirty feet from where  
 12 Plaintiff described standing while shooting the gun. *Id.* Eastham also found the bullet  
 13 itself in the middle of the street and gathered this as evidence. *Id.* As he wrote in his  
 14 deputy report, "There was no blood or any evidence in [Plaintiff's] yard. All the evidence  
 15 was located in the street." *Id.*

16 Eastham then arrested Plaintiff. *Id.* Eastham's report states that he confronted  
 17 Plaintiff with the discrepancy between where the evidence was found and where Plaintiff  
 18 claimed he shot Westcott. *Id.* According to Eastham, Plaintiff then admitted that he fired  
 19 the shot while closer to the street than he originally described. *Id.* The complaint alleges  
 20 that Eastham "totally disregarded Mr. Westcott's and Ms. May contracting stories on what  
 21 had occurred, failed to interview witnesses, and speak to Deputy Zimmerman about his  
 22 prior communications and instructions to [Plaintiff], instead he arrested [Plaintiff] who  
 23 was the victim of an assault by Mr. Westcott and Ms. May." Compl. ¶ 4.16. Around this  
 24 same time, Pacific County Sergeant Jonathon Ashley and Pacific County Deputy Kimball  
 25 were dispatched to Ocean Beach Hospital where they interviewed Westcott, obtained his  
 26

1 clothing, and collected it as evidence. Dkt. # 14 (Declaration of Jonathon Ashley) ¶¶ 2, 3;  
 2 Dkt. # 16 (Declaration of Tony Kimball) ¶¶ 2, 3.

3 Plaintiff was charged with assault in the first degree. Dkt. #41, Ex. B (Information).  
 4 Additionally, because Plaintiff had at least four prior felony convictions in California, he  
 5 was also charged with unlawful possession of a firearm in the first degree. *Id.*; *see also*  
 6 Dkt. 15, Ex. C (Thomas criminal history record). In November 2020 Plaintiff entered a  
 7 plea agreement in which the Assault charge was dismissed and he entered a guilty plea for  
 8 Unlawful Possession of a Firearm. *Id.*, Ex. C (Thomas Plea Agreement). He was  
 9 sentenced to 15 months of incarceration. *Id.* As part of his plea agreement, Plaintiff agreed  
 10 to waive any appeal, personal restraint petition, or collateral attack of the criminal case  
 11 against him. *Id.* Further, both Plaintiff and the State of Washington agreed that the court  
 12 could consider the probable cause statement and police reports to establish a factual basis  
 13 for the plea. *Id.*

14 On September 13, 2021, Plaintiff filed a Standard Tort Claim Form with the  
 15 Pacific County Board of Commissioners asserting civil rights violations in connection  
 16 with his arrest. *Id.*, Ex. D. Plaintiff now brings claims under 42 U.S.C. § 1983 and  
 17 Washington state law, including malicious prosecution, intentional infliction of emotional  
 18 distress, negligent infliction of emotional distress (outrage), false arrest, negligence,  
 19 defamation, and abuse of process. Compl. ¶¶ 5.1-13.5. Plaintiff alleges that his  
 20 constitutional rights were violated by the Pacific County Sheriff's Office and the various  
 21 officers named as defendants when he was arrested, and that law enforcement should have  
 22 known that Plaintiff's conduct was done in self-defense. *Id.* at ¶¶ 5.1, 5.3. Further,  
 23 Plaintiff alleges that the charges brought against him were based on false reporting, a  
 24 failure to investigate and collect exculpatory evidence by law enforcement, and false  
 25 statements made by Westcott and May. *Id.* at ¶¶ 6.1, 10.1.

1 On November 24, 2019, Plaintiff filed his complaint in Pacific County Superior  
2 Court. Dkt. # 1-2. County Defendants, through counsel, removed the matter to federal  
3 court pursuant to 28 U.S.C. § 1441(a) on December 13, 2021. Dkt. # 1. County  
4 Defendants filed an Answer on December 23, 2021. Dkt. # 6. County Defendants then  
5 filed for summary judgment seeking dismissal of the case on January 10, 2022. Dkt. # 12.  
6 Plaintiff filed a Response which requested an opportunity to conduct discovery and obtain  
7 evidence for his claims. Dkt. # 21. This Court deferred ruling on County Defendants'  
8 motion and granted Plaintiff 45 days, as requested, to conduct discovery. Dkt. # 30 at 5.  
9 Further, this Court granted Defendants leave to re-file their summary motion following the  
10 close of discovery. *Id.*

11 Soon thereafter, County Defendants re-filed their summary judgment motion. Dkt.  
12 # 33. Plaintiff filed a response, Dkt. # 38, and a supplemental response, Dkt. # 40 in  
13 opposition to Defendants' motion. Defendants filed a supplemental reply asking this court  
14 to strike each exhibit attached to Plaintiff's Supplemental Declaration on the basis of  
15 hearsay and relevance objections. Dkt. # 39. On April 27, 2023, this Court ordered  
16 Plaintiff to show cause why Defendants Jesse Westcott and Genevieve May should not be  
17 dismissed from this matter for want of prosecution. Dkt. # 42. Plaintiff provided no  
18 response, and this Court ordered that Westcott and May were dismissed from this matter  
19 without prejudice for failure to prosecute. Dkt. # 44.

20 In May 2023, Plaintiff obtained counsel, who filed a motion seeking to have this  
21 Court set a scheduling conference and issue a scheduling order. Dkt. # 47. County  
22 Defendants opposed setting a trial date prior to the resolution of the pending summary  
23 judgment motion. Dkt. # 49.

1           **II. SUMMARY JUDGMENT**

2           **a. Evidence Submitted**

3           In support of their motion for summary judgment, County Defendants submit the  
4 following declarations:

- 5           • Deputy Eastham, who arrested Plaintiff after the shooting. Dkt. # 15.  
6           Attached to his declaration is a Pacific County Sheriff Call Detail Log for  
7           “Weapon Offense” (Ex. A), Eastham’s Deputy Incident Report (Ex. B),  
8           Plaintiff’s criminal history record (Ex. C), and Eastham’s Probable Cause  
9           Statement (Ex. D).
- 10          • Deputy Zimmerman, who responded to Plaintiff’s initial call concerning  
11           Westcott’s threat. Dkt. # 18. Attached to his declaration is his report of his  
12           response to Plaintiff’s call (Ex. A).
- 13          • Sergeant Ashley, who interviewed Westcott at the hospital and took the  
14           clothing Westcott wore into evidence. Dkt. # 14. Attached to his declaration  
15           is a copy of his report of his interview with Westcott (Ex. A).
- 16          • Deputy Kimball, who, along with Sergeant Ashley, interviewed Westcott at  
17           the hospital and took the clothing Westcott wore into evidence. Dkt. # 16.  
18           Attached to his declaration is a copy of his report of his interview with  
19           Westcott (Ex. A).
- 20          • Robin Souvenir, who was the Pacific County Sheriff at the time of the  
21           incidents described in Plaintiff’s complaint. Dkt. # 17. Attached to  
22           Souvenir’s declaration is a copy of Pacific County’s policies on law  
23           enforcement authority, oath of office, policy manual, organizational  
24           structure, training policy, use of force policy, and policies concerning  
25           searches and seizures (Ex. A).
- 26

1 In opposition to County Defendants' motion for summary judgment, Plaintiff  
2 submits the following declarations:

- 3 • Plaintiff Delano Thomas. Dkt. ## 22, 41. Attached to Plaintiff's  
4 supplemental declaration (Dkt. # 41) is the Declaration of Probable Cause  
5 (Ex. A), Information filed in connection with his criminal case (Ex. B),  
6 Plaintiff's Plea Agreement (Ex. C), Plaintiff's Standard Tort Claim filed  
7 with the Pacific County Board of Commissioners (Ex. D), a June 2020  
8 article from the Chinook Observer about Plaintiff titled "Man Still in Jail for  
9 Shooting He Says Was in Self-Defense" (Ex. E), and Pacific County Sheriff  
10 Call Detail Report for "Threats" (Ex. F).
- 11 • David Seals, a retired police officer. Dkt. # 23. Seals states that he  
12 personally arrived on the scene of the shooting shortly after the incident. He  
13 states that he observed a knife on the scene, and a young blond woman  
14 claimed ownership of the knife. He says that Pacific County deputies never  
15 asked him for a statement and did not take his contact information. Attached  
16 to his declaration is correspondence showing where he reached out to  
17 Plaintiff's former criminal counsel and provided his recollection of the  
18 scene (Ex. A).
- 19 • Franklin Wilson, a licensed private investigator. Dkt. # 24. Franklin states  
20 that Plaintiff's criminal matter was plagued with discovery delays and that  
21 Pacific County failed to produce witnesses for the defense to interview or  
22 provide medical records supporting victims' injuries. Attached to his  
23 declaration, *inter alia*, are the November 6, 2019 Pacific County Call Detail  
24 Log for the dogfight and a subsequent physical confrontation between  
25 Schuyler and Wendee Thomas (Ex. 6), and Wilson's notes and impressions  
26

1           of the audio recordings of Ashley's interview of Westcott and Eastham's  
 2           interview of May (Ex. 7). According to Wilson, these interviews contain  
 3           exculpatory evidence that did not make it into official police reports.

4           **b. Legal Standard**

5           Summary judgment is supported if the pleadings, the discovery and disclosure  
 6           materials on file, and any affidavits show that there is no genuine issue as to any  
 7           material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ.  
 8           Procedure 56(c). The moving party bears the initial burden to demonstrate the absence  
 9           of a genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
 10          323 (1986). If the moving party meets his or her burden, the nonmoving party must go  
 11          beyond the pleadings and identify facts which show a genuine issue for trial. *Cline v.*  
 12          *Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223, 1229 (9th Cir. 2000). A  
 13          genuine dispute of material fact is presented when there is sufficient evidence for a  
 14          reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby,*  
 15          *Inc.*, 477 U.S. 242, 253 (1986).

16           To establish that a fact cannot be genuinely disputed, the movant may cite the  
 17          record or show "that the materials cited do not establish the... presence of a genuine  
 18          dispute, or that an adverse party cannot produce admissible evidence to support the  
 19          fact." Fed. R. Civ. P. 56(c)(1). In response to a motion for summary judgment, the non-  
 20          moving party must present specific facts, and cannot rely on conclusory allegations.  
 21          *Hansen v. U.S.*, 7 F.3d 137, 138 (9th. Cir. 1993). Although "all justifiable inferences"  
 22          must be drawn in the non-movant's favor, *Anderson*, 477 U.S. at 255 (citing *Adickes v.*  
 23          *S.H. Kress & Co.*, 398 U.S. 144, 158-159 (1970)), "[t]he mere existence of a scintilla of  
 24          evidence in support of the plaintiff's position will be insufficient; there must be  
 25          evidence on which the jury could reasonably find for the plaintiff." *Anderson*, 477 U.S.

1 at 252. “The Court’s ultimate inquiry is to determine whether the ‘specific facts’ set  
 2 forth by the non-moving party, coupled with undisputed background or contextual  
 3 facts, are such that a rational or reasonable jury might return a verdict in its favor based  
 4 on that evidence.” *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass’n*, 809 F.2d 626,  
 5 631 (9th Cir. 1987).

### 7           **III. DISCUSSION**

#### 8           **a. Federal Claims**

9           County Defendants seek dismissal of all federal civil rights claims against them in  
 10 their individual capacities on the merits and on the grounds of qualified immunity. Dkt. #  
 11 12 at 1-2. The Pacific County Sheriff’s Department moves for dismissal of all federal civil  
 12 rights claims on the ground that the complaint is factually deficient, and Plaintiff lacks  
 13 evidence to prove municipal entity liability. *Id.*

#### 14           **i. Illegal Seizure and Arrest**

15           Plaintiff alleges that he was deprived of his right to be free from illegal searches  
 16 and seizures, in violation of the Fourth Amendment, by the actions of Eastham, Ashley,  
 17 Zimmerman, and Kimball. Compl. ¶ 5.1. Defendants argue that, at the very least, federal  
 18 claims against Ashley, Kimball, and Zimmerman should be dismissed because Plaintiff  
 19 has failed to prove that they personally participated in the deprivation of Plaintiff’s civil  
 20 rights. Dkt. # 12 at 9. Further, County Defendants argue that each officer is entitled to  
 21 qualified immunity. *Id.*

##### 22            *1. Personal Participation of Kimball, Ashley, and Zimmerman.*

23           At the outset, this Court must consider the extent to which each of the named  
 24 officers—Eastham, Zimmerman, Ashley, and Kimball—were personally involved in  
 25 Plaintiff’s alleged unlawful arrest. Based on the facts alleged in the complaint and the  
 26 exhibits submitted by the parties, it is clear that Deputies Zimmerman and Kimball and

1 Sergeant Ashley did not personally participate in the seizure or arrest of Plaintiff.  
 2 Zimmerman responded to Plaintiff's *earlier* call concerning Westcott's threat, Compl. ¶  
 3 4.5, and Ashley and Kimball collected recorded statements from Westcott and May and  
 4 obtained Westcott's clothing, which they provided to Eastham as evidence. Dkt. ## 14,  
 5 16. A plaintiff in a Section 1983 action must allege facts showing how individually  
 6 named defendants caused or personally participated in causing the harm alleged in the  
 7 complaint. *Arnold v. IBM*, 637 F.2d 1350, 1335 (9th Cir. 1981). Here, Plaintiff's  
 8 allegations that Kimball, Ashley, and Zimmerman were involved in the violation of his  
 9 federal civil rights due to Plaintiff's arrest are conclusory and rest only on the officers'  
 10 peripheral involvement in the ongoing disputes between Plaintiff, Westcott, and May.  
 11 Plaintiff's federal civil rights claims for illegal seizure and arrest are **DISMISSED** as to  
 12 Defendants Kimball, Ashley, and Zimmerman for this reason.

13                   2. *Qualified Immunity*

14       Under the qualified immunity doctrine, "government officials performing  
 15 discretionary functions generally are shielded from liability for civil damages insofar as  
 16 their conduct does not violate clearly established statutory or constitutional rights of which  
 17 a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).  
 18 To determine whether qualified immunity applies, the court engages in a two-part  
 19 analysis. The court considers whether "the facts alleged show the officers' conduct  
 20 violated a constitutional right." *Navarro v. City of South Gate*, 81 Fed. Appx. 192, 193  
 21 (9th Cir. 2003). If the court concludes that a violation could be made out, the court asks if  
 22 the right was clearly established. *Id.* "That is, we must determine whether '[t]he contours  
 23 of the right [are] sufficiently clear that a reasonable official would understand that what he  
 24 is doing violates that right.'" *Id.* (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)).  
 25 Plaintiff "bears the burden of showing that the right at issue was clearly established."  
 26

1       *Alston v. Read*, 663 F.3d 1094, 1098 (9th Cir. 2011). “Because qualified immunity is ‘an  
 2 immunity from suit rather than a mere defense to liability... it is effectively lost if a case is  
 3 erroneously permitted to go to trial.’” *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)  
 4 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)).

5           An arrest without probable cause violates the Fourth Amendment and gives rise to  
 6 a claim for damages under Section 1983. *Rosenbaum v. Washoe Cnty.*, 663 F.3d 1071,  
 7 1076 (9th Cir. 2011); *Cabrera v. City of Huntington Park*, 159 F.3d 374, 380 (9th Cir.  
 8 1998) (“To prevail on [plaintiff’s] §1983 claim for false arrest and imprisonment,  
 9 [plaintiff] would have to demonstrate there was no probable cause to arrest him.”).  
 10 “Probable cause exists when under the totality of the circumstances known to the arresting  
 11 officers, a prudent person would have concluded that there was a fair probability that [the  
 12 individual arrested] had committed a crime.” *Grant v. City of Long Beach*, 315 F.3d 1081,  
 13 1085 (9th Cir. 2002) (internal quotations omitted). “In a § 1983 action seeking damages  
 14 for an arrest without probable cause, the qualified immunity inquiry... is an objective one,  
 15 focusing on whether a reasonable officer could have believed that probable cause existed  
 16 to arrest the plaintiff.” *Navarro*, 81 Fed. Appx. at 194 (citing *Mendocino Env’t Ctr. v.  
 17 Mendocino Cnty.*, 14 F.3d 457, 462 (9th Cir. 1994)) (internal quotations omitted). In this  
 18 context, “the defendant’s knowledge is relevant, since the objective analysis is focused on  
 19 a reasonable officer confronted with the facts and circumstances actually known to the  
 20 officer.” *Id.*

21           This Court finds that defendant Eastham’s conduct in arresting Plaintiff did not  
 22 violate Plaintiff’s constitutional rights, as Plaintiff has not produced evidence to show that  
 23 Eastham did not have probable cause to arrest Plaintiff after the shooting of Westcott. By  
 24 Plaintiff’s own admission, he shot Westcott in the groin. Dkt. # 22 ¶ 16 (“...I fired a shot  
 25 at [Westcott]...”). Plaintiff took this action based on his belief that Westcott and May  
 26

were armed and likely to harm him. These facts alone constitute probable cause for his arrest for assault in the first degree in violation of RCW 9A.36.011(1)(a)<sup>1</sup> and unlawful possession of a firearm in violation of RCW 9.41.040.<sup>2</sup>

Plaintiff's case rests on his assertion that his arrest lacked probable cause because he acted in self-defense. Dkt. # 22 ¶ 18. He alleges that Eastham and other officers knew that Westcott and May were the aggressors, knew that May was armed with a knife, and allowed May to "walk away with exculpatory evidence" that would have established that Plaintiff acted in self-defense. *Id.* However, that Plaintiff may have had a self-defense argument that he reasonably believed that Westcott and May were going to harm him is not enough to undo a finding of probable cause. *Yousefian v. City of Glendale*, 779 F.3d 1010, 1014 (9th Cir. 2015) ("The mere existence of some evidence that could suggest self-defense does not negate probable cause"); *see also Calvin v. Whatcom Cnty.*, No. C07-273RSL, 2009 WL 3187589, at \*5 n. 7 (W.D. Wash. Sept. 30, 2009). According to Eastham, he based his finding of probable cause on the statements of the parties and the evidence found on the scene. Dkt. # 15. Eastham found particularly important the location of the bullet and bullet casing connected with the shot. These pieces of evidence were found in the street, feet away from where Plaintiff indicated that he stood as he fired at Westcott, and feet away from where they would have been had Westcott been shot while standing in Plaintiff's yard. Dkt. # 15, Ex. D. Plaintiff does not present evidence to dispute this fact. Although Plaintiff claims that County Defendants left exculpatory evidence at the scene, he does not clearly state what that evidence is or how it would have altered

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<sup>1</sup> RCW 9A.36.011(1)(a) provides that a person is guilty of assault in the first degree if he or she, with intent to inflict great bodily harm, assaults another with a firearm or any deadly weapon or by any force or means likely to produce great bodily harm or death.

<sup>2</sup> RCW 9.41.040 provides that a person, whether an adult or juvenile, is guilty of the crime of unlawful possession of a firearm in the first degree, if the person owns, accesses, has in the person's custody, control, or possession, or receives any firearm after having previously been convicted or found not guilty by reason of insanity in this state or elsewhere of any serious offense.

1 Eastham's probable cause analysis at the time. Neither does Plaintiff explain the  
 2 significance of May being armed with a knife, given that it is undisputed that Westcott had  
 3 on him a collapsible baton. Examining these undisputed facts, and viewing these facts  
 4 from the standpoint of an objectively reasonable police officer, no reasonable jury could  
 5 find there was not a fair probability that Plaintiff had committed a crime. *C.D. v. City of*  
 6 *Anaheim*, No. 8:17-CV-01162-DOC, 2018 WL 5816201, at \*8 (C.D. Cal. Aug. 24, 2018).  
 7 Because the facts in the complaint, taken in the light most favorable to Plaintiff, show that  
 8 Plaintiff's arrest was supported by probable cause, he cannot plead a constitutional  
 9 wrongful arrest claim, and his claim is subject to **DISMISSAL** on this basis. *Fayer v.*  
 10 *Vaughan*, 649 F.3d 1061, 1065 (9th Cir. 2011).

11           **ii. *Monell* Liability**

12 Plaintiff alleges that the Pacific County Sheriff's Office had a mandatory duty of  
 13 care to hire properly and adequately train, retain, supervise, and discipline Eastham,  
 14 Ashley, Zimmerman, and Kimball so as to avoid unreasonable risk of harm to its citizens,  
 15 and failed to take necessary, proper, or adequate measures in order to prevent the violation  
 16 of Plaintiff's rights. Compl. ¶ 5.3. According to Plaintiff, Defendants knew or should have  
 17 known that Plaintiff's conduct was in self-defense and did not constitute probable cause to  
 18 arrest him, and Pacific County's policies, practices and customs caused him to be deprived  
 19 of his right to be free from unreasonable seizures and excessive force. *Id.* ¶¶ 5.3, 5.4.  
 20 Defendants argue that there is no underlying constitutional violation, and therefore no  
 21 cognizable claim for municipal liability under Section 1983. Dkt. # 12 at 13-14.

22 To establish municipal, or *Monell*, liability Plaintiff must provide the existence of  
 23 an unconstitutional government policy, regulation, or custom that caused the alleged  
 24 deprivation of rights. *City of St. Louis v. Praprotnik*, 485 U.S. 112, 121 (1988); *see also*  
 25 *Monell v. New York City. Dept. of Soc. Serv.*, 485 u.S. 112 (1978). "To impose liability

1 against a county for its failure to act, a plaintiff must show: (1) that a county employee  
 2 violated the plaintiff's constitutional rights; (2) that the county has customs or policies that  
 3 amount to deliberate indifference; and (3) that these customs or policies were the moving  
 4 force behind the employee's violation of constitutional rights." *Long v. Cnty. of L.A.*, 442  
 5 F.3d 1178, 1186 (9th Cir. 2006).

6 As discussed *supra*, Section III.a.i.2, Plaintiff has not presented any evidence that  
 7 Eastham (or Zimmerman, Ashley, and Kimball) violated his constitutional rights. Further,  
 8 Plaintiff has not presented any evidence that Pacific County failed to adequately hire  
 9 properly and adequately train, retain, supervise, and discipline the defendant officers. The  
 10 same is true of Plaintiff's claim that Pacific County failed to take necessary, proper, or  
 11 adequate measures in order to prevent the violation of Plaintiff's rights. In regard to his  
 12 *Monell* claim, Plaintiff asserts that his alleged wrongful arrest reflects deficient training  
 13 and inappropriate policies, but does not point to exactly what policy or practice drove the  
 14 officers' violation of his rights. Plaintiff's assertion that he acted in self-defense and  
 15 conclusory accusation that exculpatory evidence was ignored due to a failure of policy or  
 16 training are simply insufficient to create a material issue of fact as to *Monell* liability. This  
 17 claim, therefore, is **DISMISSED**.

### 18           iii. Judicial Deception

19 Plaintiff's second cause of action is for judicial deception. He alleges that the  
 20 County Defendants "made deliberate falsehoods and acted with disregard for the truth in  
 21 submitting official sworn reports and failing to file reports outlining exculpatory evidence  
 22 to the Pacific County Prosecuting Attorney." Compl. ¶ 6.1 But for the officers'  
 23 dishonesty, Plaintiff alleges, the criminal charges against Plaintiff would not have  
 24 occurred. *Id.* ¶ 6.2. County Defendants do not address Plaintiff's judicial deception claim  
 25 specifically in their briefing, except to say that Ashley, Kimball, and Zimmerman did not  
 26

1 personally participate in any attempt to disregard the truth in submitting reports. Dkt. # 12,  
 2 9-11. However, in any event, Plaintiff's claim cannot survive summary judgment.  
 3

4 To survive summary judgment on a judicial deception claim, Plaintiff "must 1)  
 5 make a substantial showing of [the officers'] deliberate falsehood or reckless disregard for  
 6 the truth and 2) establish that, but for the dishonesty, the [arrest] would not have  
 7 occurred." *Liston v. Cnty. of Riverside*, 120 F.3d 965, 973 (9th Cir. 1997). Plaintiff cannot  
 8 clear this bar. Plaintiff attacks Eastham's probable cause statement, Dkt. # 41, Ex. A.,  
 9 arguing that it presents conflicting testimony between May, Westcott, and Thomas, and  
 10 fails to inform the Pacific County court that May was armed—information that Plaintiff  
 11 believes is exculpatory. Dkt. # 40 at 2. However, the fact that the probable cause statement  
 12 presents the statements of Thomas, Westcott, and May does not establish that Eastham  
 13 provided "deliberate falsehoods" or acted with "reckless disregard for the truth." It simply  
 14 shows that Eastham included in his statement the divergent and conflicting stories of the  
 15 three main participants of the altercation. And even if this Court were to find that Eastham  
 16 deliberately failed to mention May being armed with a knife, the omission was  
 17 immaterial. *Chism v. Washington State*, 661 F.3d 380, 387-88 (9th Cir. 2011) (to make out  
 18 a judicial deception claim, plaintiff must establish that false statements or omissions were  
 19 material to the court's probable cause determination); *Ewing v. City of Stockton*, 588 F.3d  
 20 1218, 1224 (9th Cir. 2009) ("Omissions or misstatements resulting from negligence or  
 21 good faith mistakes will not invalidate an affidavit which on its face establishes probable  
 22 cause."). For the reasons discussed above, this Court does not find it likely that the Pacific  
 23 County Superior Court would have declined to issue an arrest warrant had it known that  
 24 May was also armed, as the probable cause statement made clear that Westcott was in  
 25 possession of a weapon at the time of the shooting and Plaintiff himself declared that he  
 26 shot Westcott. Dkt. # 41, Ex. A.

1        Additionally, Plaintiff's challenge to the statements within the probable cause  
 2 statement fail because, as a part of Plaintiff's plea agreement stemming from the shooting,  
 3 Plaintiff agreed that the probable cause statement could be used to establish a factual basis  
 4 for his plea. Dkt. # 41, Ex. C. The probable cause statement included the following  
 5 admissions from Plaintiff: that he had a firearm and placed it in the trunk of his car, that he  
 6 shot Westcott, and that he purposefully aimed towards the lower part of Westcott's body  
 7 so as to avoid his chest area. Dkt. # 41, Ex. A. Plaintiff's stipulation to the factual basis for  
 8 his plea and Plaintiff's waiver of his opportunity to challenge the facts underlying the  
 9 charges against him severely undercut his claim of judicial deception. All told, Plaintiff  
 10 has not presented evidence that the probable cause statement contains reckless or  
 11 deliberate false statements or omissions, and such false statements or omissions were  
 12 material to the court's probable cause determination. Therefore, Plaintiff's second cause  
 13 of action is **DISMISSED**.

14        **b. State Law Claims**

15        Plaintiff brings state law claims for malicious prosecution, intentional infliction of  
 16 emotional distress (outrage), negligent infliction of emotional distress, false arrest,  
 17 negligence, defamation, and abuse of process. Compl. ¶¶ 7.1-13.5. County Defendants  
 18 move for dismissal of Plaintiff's state law claims on the basis of the *Heck* doctrine, *Heck*  
 19 v. *Humphrey*, 512 U.S. 477 (1994), the statute of limitations, statutory immunities, or  
 20 other state law defenses. Dkt. # 12 at 2.

21        Under 28 U.S.C. § 1367(c), a district court may "decline to exercise supplemental  
 22 jurisdiction over a claim ... if the district court has dismissed all claims over which it has  
 23 original jurisdiction." 28 U.S.C. § 1367(c)(3). "The Supreme Court has stated, and [the  
 24 Ninth Circuit has] often repeated, that 'in the usual case in which all federal-law claims  
 25 are eliminated before trial, the balance of factors...will point toward declining to exercise

1 jurisdiction over the remaining state-law claims.”” *Acri v. Varian Assoc., Inc.*, 114 F.3d  
 2 999, 1001 (9th Cir. 1997) (quoting *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350  
 3 n.7 (1988)). As discussed, *supra*, this Court will grant summary judgment to County  
 4 Defendants on Plaintiff’s first and second causes of action, and only Plaintiff’s state law  
 5 claims remain. There is no indication that Plaintiff’s state law claims cannot be fairly  
 6 decided in Washington state court and concerns of judicial economy do not weigh in favor  
 7 of this Court retaining jurisdiction over the remaining claims. *See Acri*, 114 F.3d at 1001  
 8 (discretion to exercise supplemental jurisdiction is informed by the values of economy,  
 9 convenience, fairness, and comity). This Court, therefore, declines to exercise  
 10 supplemental jurisdiction over the remainder of Plaintiff’s state law claims.

11           **c. County Defendants’ Request to Strike**

12           County Defendants request in their supplemental reply that this Court strike each  
 13 exhibit attached to Plaintiff’s supplemental declaration at Dkt. # 41 on the basis of hearsay  
 14 and relevance objections. Dkt. # 39 at 2-3. The documents County Defendants seek to  
 15 strike include the probable cause statement, which County Defendants also submitted in  
 16 support of their motion for summary judgment and attached to Eastham’s declaration as  
 17 Exhibit D. Dkt. # 15. Other documents, such as the Information filed with Pacific County  
 18 Superior Court (Dkt. #41, Ex. B) and Plaintiff’s plea agreement (Dkt. # 41, Ex. B) are  
 19 state court records.

20           The Court declines to strike the exhibits submitted by Plaintiff. Evidence submitted  
 21 in connection with summary judgment does not have to be produced in a form that would  
 22 be admissible at trial in order to avoid summary judgment. *Varney v. Air & Liquid Sys.*  
 23 *Corp.*, No. C18-5105 RJB, 2019 WL 2409632, at \*6 (W.D. Wash. June 7, 2019) (citing  
 24 *Celotex*, 477 U.S. at 324). “Rule 56(e) permits a proper summary judgment motion to be  
 25 opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere

1 pleadings themselves..." *Celotex*, 477 U.S. at 324. This could include "depositions,  
2 documents, electronically stored information, affidavits or declarations, stipulations...  
3 admissions, interrogatory answers, or other materials[.]" Fed. R. Civ. P. 56(c)(1)(A). Such  
4 is the case here. Therefore, the Court declines to strike Plaintiff's supplemental declaration  
5 and the exhibits attached thereto.

6

7 **IV. CONCLUSION**

8 For the foregoing reasons, County Defendants' Motion for Summary Judgment is  
9 **GRANTED** as to Plaintiff's first and second causes of action. Dkt. # 33. This Court declines  
10 to exercise supplemental jurisdiction over Plaintiff's remaining claims, which arise under  
11 Washington state law. Plaintiff's Motion to Set a Scheduling Conference is **DENIED as**  
12 **moot**. Dkt. # 47.

13

14 Dated this 28th day of September, 2023.

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19 The Honorable Richard A. Jones  
20 United States District Judge  
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